of persuasive authority[13] are enough to permit the court to give presumptive weight to such a judgment. Moreover the case seems within section 1851 of the Code of Civil Procedure, which says, "where the question in dispute between the parties is the obligation or duty of a third person, whatever would be evidence for or against such person is prima facie evidence between the parties."

M. M. P.

CORPORATIONS: LIABILITY OF A STOCKHOLDER UPON THE ASSIGNMENT OF A LEASE TO A CORPORATION — In *Realty & Rebuilding Company v. Rea*[1] a lease containing a covenant to pay rent and an option to extend the lease was assigned to a corporation which later exercised the option, giving notice to the lessor that it did so "under and upon and subject to all the terms and conditions in said lease." Subsequently, and more than three years after the assignment, individual stockholders of the assignee corporation were sued for rent recently fallen due. The defense was made that the liability, even for the extended term, dated from the assignment, and hence that the action was barred by section 359 of the Code of of Civil Procedure.[2] The Supreme Court, however, overruling the District Court of Appeal,[3] held that the liability did not date back to the assignment. The precise ground upon which the court rested its decision seems to be that the notice given by the assignee at the time of exercising the option was not a mere exercise of the option to extend but amounted to a new, independent contract by the assignee to perform the covenants of the lease, imposing an obligation separate and distinct from any assumed by him by virtue of the assignment or of the extension.

A new contract could, of course, be superimposed upon all previous obligations, and would start a fresh line of liability: but there are two objections to the court's position. First, it is difficult to see what consideration was given by the lessor, whose only act was to accept a notice that the assignee had chosen to exercise his legal rights.[4] Second, it is unnatural to construe a

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practical advantage. On the other hand, unless carefully applied, there is a possibility of hardship to the defendant stockholder.

[13] Wheatley v. Glover (1906) 125 Ga. 710, 154 S. E. 626; In re Warren's Estate (1884) 52 Mich. 557, 18 N. W. 356, Smith v. Dixon (1912) 150 Wis. 110, 135 N. W. 841.

[1] (December 27, 1920) 61 Cal. Dec. 11, 194 Pac. 1024.

[2] ". . . actions against directors or stockholders of a corporation . . . . to enforce a liability created by law. . . .must be brought within three years after the liability was created."

[3] Realty & Rebuilding Co. v. Rea & Sullivan (1920) 31 Cal. App. Dec. 315, 188 Pac. 621.

[4] Similarly it has been held that the lessor's consent to the assignment of a lease is no consideration for the assignee's promise to be personally liable for rent, if the lessor's consent was not necessary to the assignment: Dougherty v. Matthews (1865) 35 Mo. 520, 88 Am. Dec. 126; Stern v. Florence Sewing Machine Co. (1876) 53 How. Prac. (N. Y.) 478; Seventy Eighth St. etc. Co. v. Purssell Mfg. Co. (1915) 155 N. Y. Supp. 259; Ann. Cas. 1916E 810.

notice that the assignee took "subject to" the covenants, into an agreement "to perform the covenants." The better authority holds that an agreement to take "subject to" the covenants does not impose any affirmative duty,[5] any more than an agreement to "take subject to" a mortgage amounts to a personal assumption of the same.

Can the decision nevertheless be justified? The court lays great stress upon the fact that previous to the "contract" on the part of the assignee at the time of exercising the option, he was liable, not by virtue of "privity of contract," but solely by virtue of "privity of estate"; and seems to imply that for this reason its liability would not have dated from the assignment even if it had not contracted specially at the time of exercising the option. Just why the fact that the assignee's liability springs from privity of estate prevents it from dating from the assignment, is not clear. The assignee cannot be treated like a tenant whose liability is for use and occupation only and accrues afresh with each rental period, because, unlike the latter, his liability on covenants running with the land depends on his ownership of the leasehold, not on possession.[6] Thus, it antedates taking possession,[7] and survives abandonment[8] (although the court seems to think otherwise, influenced, perhaps, by certain erroneous dicta in the District Court of Appeal).[9] The only way in which he can terminate his liability is by taking affirmative action and reassigning.[10] Since the act of assignment, making him the owner, is ordinarily the whole basis of his liability on a covenant running with the land, it would seem logical to date the liability from the assignment.

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[5] Ann. Cas. 1916E 810; 16 R. C. L. 869; 1 Tiffany Landlord and Tenant, 990.

[6] 1 Tiffany Landlord and Tenant, 974; Bonetti v. Treat (1891) 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151.

[7] 1 Tiffany Landlord and Tenant, 974; 24 Cyc. 982. Cf. Potts Drug Co. v. Benedict (1909) 156 Cal. 323, 104 Pac. 432.

[8] 24 Cyc. 982; 1 Tiffany Landlord and Tenant, 993; Bonetti v. Treat, supra, n. 6, though modified in certain respects by Lopizich v. Salter (1920) 31 Cal. App. Dec. 161, 187 Pac. 1075, remains authority for this statement.

[9] Chase v. Oehlke (1919) 30 Cal. App. Dec. 79, 185 Pac. 425; Lopizich v. Salter, supra, n. 8; Lutton v. Rau (1918) 37 Cal. App. 429, 173 Pac. 1111, like the principal case, is ambiguous, stating that an assignee in the absence of express contract "is liable for the payment of rent during the period of his *occupancy*, and may terminate his liability by *reassignment*." It is patent that this statement contains two different tests as to the termination of the assignee's liability. The dictum in Chase v. Oehlke, supra, seems based on a misconception of Samuels v. Ottinger (1915) 169 Cal. 209, 146 Pac. 638. This last case held that where there was no express covenant to pay rent *in the original lease*, the lessee, being liable only by virtue of privity of estate, would cease to be liable for the rent when that privity of estate was severed by his assignment of the leasehold. In Chase v. Oehlke the court evidently confused the necessity of an express covenant to pay rent in the original lease, to bind the lessee after assignment, with the necessity of a special contract to be liable by an assignee of a lease which does contain such express covenants, in order to render such assignee liable after abandonment.

[10] 1 Tiffany's Real Property, 183.

Otherwise, we should be forced to the absurdity of dating it from some subsequent non-material fact.

Nevertheless, in view of the peculiar facts of the principal case (i. e., that the assignee's liability as to the extended period was not complete at the time of the assignment, but depended upon a future act on his part) it may well be that the ultimate decision for the plaintiff was correct, even though no new contract was entered into. A decision either way on this point would be unassailable; for the ambiguity of the term "liability" in section 359 leaves the courts free to construe it as covering an "optional liability" or not, as they choose.[11]

The principal case also decided that a covenant by the lessee to repair and to "surrender the premises in as good condition as the same now are" does not impose any duty on him to rebuild, in case a building is entirely destroyed. This holding is in accord with the better view,[12] although there is a dictum[13] and an early California case[14] contra. The attitude of the courts on this question illustrates simultaneously both the tendency to modify the rigor of the common law of landlord and tenant in favor of the tenant, and the tendency to interpret a contract in accordance with the probable intention of the parties rather than by rigid rules of law.

H. R.

DEEDS: CONDITIONAL DELIVERY: EFFECT ON PASSAGE OF TITLE OF GRANTEE'S IGNORANCE OF DEED—A makes a deed to B, and delivers the deed to C to hold until A's death, and then to deliver to B. What is the effect of this transaction, sometimes called an "escrow" but better termed a conditional delivery? According to one view, title does not pass to B until the final delivery to him, although it thereupon relates back to the date of the delivery to C.[1] But according to the better rule, and the one obtaining in California, title passes immediately, subject to a reservation of a life estate to A.[2]

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[11] See concurrence by Olney, J. in Chambers v. Farnham (1920) 182 Cal. 181, 187 Pac. 732. For a review of the interpretation to which Cal. Code Civ. Proc. § 359 has been subjected, see 7 Fletcher's Cyclopedia Corporations, 7442 ff. See also 8 California Law Review, 255; 7 California Law Review, 346; 4 California Law Review, 246.

[12] 16 R. C. L. 1091.

[13] Egan v. Dodd (1917) 32 Cal. App. 706, 154 Pac. 17.

[14] Polack v. Pioche (1868) 35 Cal. 416, 95 Am. Dec. 115.

[1] 2 Tiffany Real Property, 1785.

[2] 2 Tiffany Real Property, 1784; 8 R. C. L. 1018; Bury v. Young, (1893) 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Hunt v. Wicht (1917) 174 Cal. 205, 162 Pac. 639; Williams v. Kidd (1915) 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E 703; Wittenbrock v. Cass (1895) 110 Cal. 1, 42 Pac. 300; Husheon v. Kelley (1912) 162 Cal. 656, 124 Pac. 231.